Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–487 OF 1997
NH CHAN, ABU MANSOR AND HAIDAR JJCA
5 OCTOBER 1998

Insurance *— Accident insurance — Repudiation — Personal accident policy — Insurer repudiated liability on ground that signature of deceased on proposal form was not that of deceased — Ratification of proposal by deceased upon premium being paid to insurer's authorized agent — Whether insurer can repudiate liability*

Evidence *— Adverse inference — Failure to call material witness — Inference that evidence given by such witness would be unfavourable — Evidence Act 1950 s 114(g)*

The appellant filed an action against the respondent for a sum of RM440,000 under the personal accident policy ('the PA policy') issued by the respondent to the deceased. The respondent company repudiated liability in respect of the claim on the sole ground that the signature of the deceased, which appeared on the proposal form ('D2'), was not that of the deceased. The appellant's action was dismissed by the trial judge and the appellant appealed. The issue that had to be decided was whether the respondent can repudiate liability after the deceased had ratified the proposal by paying the premium to David Lim Risk Management Sdn Bhd, the authorized agent of the respondent, which led to the respondent issuing the PA policy. Further, the appellant argued that the trial judge should have invoked s 114(g) of the Evidence Act 1950 against the respondent for not calling David Lim or his clerk to testify.

Held, allowing the appeal:

(1) By the deceased ratifying the proposal by payment of the premium and the acceptance of the proposal by the respondent by issuing a receipt for the premium received and the issuance of the PA policy, a valid contract was concluded. It was too late for the respondent to avoid liability by alleging that the signature on D2 was not that of the deceased. Unless there was evidence of collusion or connivance on the part of its agent, the respondent could not repudiate liability. In the present case, there was no allegation of collusion or connivance (see pp 307H–I and 308E).

(2) The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk. The irresistible inference would be that if David Lim or his clerk were called, their evidence would be unfavourable to the

respondent. The judge had erred when he declined to consider and invoke s 114(g) of the Evidence Act 1950 (see pp 308F–H and 309D).

[Bahasa Malaysia summary

Perayu telah memfailkan satu tindakan terhadap penentang untuk jumlah sebanyak RM440,000 di bawah polisi kemalangan diri ('polisi KD') yang dikeluarkan oleh penentang kepada si mati. Syarikat penentang telah menolak liabiliti terhadap tuntutan tersebut atas alasan tandatangan si mati, yang terdapat di atas borang cadangan ('D2'), bukanlah milik si mati. Tindakan perayu telah ditolak oleh hakim perbicaraan dan perayu membuat rayuan. Isu yang perlu ditentukan adalah sama ada penentang boleh menolak liabiliti selepas si mati telah meratifikasi cadangan tersebut dengan membayar premium kepada David Lim Risk Management Sdn Bhd, ejen berdaftar penentang, yang membawa kepada pengeluaran polisi KD oleh penentang. Selanjutnya, perayu menghujahkan bahawa hakim perbicaraan sepatutnya menggunakan s 114(g) Akta Keterangan 1950 terhadap penentang kerana tidak memanggil David Lim atau keraninya untuk memberi keterangan.

Diputuskan, membenarkan rayuan:

(1) Dengan si mati meratifikasikan cadangan tersebut dengan pembayaran premium dan penerimaan cadangan tersebut oleh penentang dengan mengeluarkan satu resit bagi premium yang diterima dan pengeluaran polisi KD tersebut, satu kontrak yang sah telah wujud. Adalah sudah terlambat bagi penentang untuk mengelak liabiliti dengan menuduh tandatangan si mati di atas D2 bukanlah milik si mati. Melainkan terdapat bukti adanya pakatan jahat atau persubahatan oleh ejennya, penentang tidak boleh menolak liabiliti. Di dalam kes ini, tiada tuduhan pakatan jahat atau persubahatan (lihat ms 307H–I dan 308E).

(2) Kehadiran David Lim atau keraninya yang mengisi borang cadangan itu boleh menghilangkan semua keraguan tentang tandatangan si mati di atas D2. Bukan sahaja David Lim atau keraninya tidak dipanggil, penjelasan juga tidak diberikan oleh syarikat penentang terhadap ketiadaan David Lim atau keraninya. Inferens yang tidak dapat dielakkan adalah jika David Lim atau keraninya dipanggil, keterangan mereka tidak akan berpihak kepada penentang. Hakim telah melakukan kesilapan apabila dia enggan untuk menimbang dan menggunakan s 114(g) Akta Keterangan 1950 (lihat ms 308F–H dan 309D).]

Notes

For a case on repudiation of liability regarding accident insurance policy, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 9.

A For cases on adverse inference arising from failure to call material witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 87–91.

Cases referred to

B *Borhanuddin bin Haji Jantara & Anor v American International Assurance Co Ltd* [1987] 1 MLJ 22 (refd)
Keeling v Pearl Assurance Co Ltd [1923] All ER 307 (refd)

Legislation referred to

C Contracts Act 1950 s 149
Evidence Act 1950 s 114(g)
Insurance Act 1996 s 151

Appeal from: Civil Suit No S5–22–25 of 1996 (High Court, Kuala Lumpur)

D *M Menon* (*Varghese a/l Onny* with him) (*Jaafar & Menon*) for the appellant.
S Kanagasabapathi (*RK Nathan & Co*) for the respondent.

Haidar JCA (delivering judgment of the court): Chan Yoke Lain ('the appellant'), as administrator of the estate of Chong Yoke Fah, deceased, E filed an action against Pacific & Orient Insurance Co Sdn Bhd ('the respondent company') for a sum of RM440,000 under the personal accident policy ('PA policy') issued by the respondent company to the deceased. In addition thereto, there is a claim for RM508 for costs of letters of administration and other disbursements and costs of the proceedings.

F The learned judge, after a full hearing, dismissed the action with costs. Hence this appeal before us.

Brief facts

The appellant was the wife of the deceased at the material time though she G has since remarried.

The respondent company issued two insurance policies at the material time prior to the deceased's death, namely:

(a) a comprehensive motor insurance policy for the deceased's Honda motorcar No WCN 9012.

H (b) a PA policy for RM440,000 in the event of death.

Upon the deceased's death on 27 November 1992 as a result of a motor accident whilst driving his motorcar No WCN 9012, the estate was paid RM15,957 on the motor insurance policy by the respondent company.

In respect of the claim on the PA policy for RM440,000, the respondent I company repudiated liability on the sole ground that the signature of the deceased which appeared on the proposal form ('D2') was not that of the deceased. It was alleged to be a forged signature of the deceased.

Issue A

The only issue is whether (even assuming the signature on the proposal form of the PA policy was not that of the deceased) after the deceased had ratified the proposal by having the premium paid to David Lim Risk Management Sdn Bhd, the authorized agent of the respondent company which subsequently issued the PA policy, can the respondent company B repudiate liability?

The learned judge, after concluding that the deceased did not sign on D2, proceeded to consider at length the legal consequence.

His consideration is grounded as follows:

C

(a) there was no offer by the insured (the deceased) since he did not sign on the proposal form (D2) and therefore there can be no acceptance by the insurer (respondent company), and when there is no acceptance, there can be no contract. Any contract purported to be created will be void ab initio;

(b) the parties are not really in consensus ad idem; and D

(c) mistake, citing s 21 of the Contracts Act 1950.

At the hearing of the appeal, counsel for both parties agreed that mistake was not pleaded (see p 30(A) of the appeal record). It was also agreed that the issue of mistake was also not submitted to the learned judge (see pp 108 to 120 of the appeal record regarding written submissions). We would, E therefore, leave out the issue of mistake from our consideration. In any event, it is not a relevant issue in so far as it concerned our decision for allowing the appeal.

Interestingly enough, the learned judge in considering the issue of offer and acceptance, answered in the negative the question — can it be said that F the offer to insure is moved by the proposer? Apparently, the negative answer was arrived at on the basis of what he perceived to be that no agency was raised. This is what he said in his judgment (p 23 of the appeal record):

> ... (barring any inferences of agency which is never raised in this case) ... .

Obviously, the learned judge was wrong as para 4 of the statement of claim G under the heading 'particulars of personal accident insurance', the cover note No A0097177 was issued by the respondent company's agent, David Lim Risk Management Sdn Bhd. Arising from the issuance of the cover note by its agent, the PA policy No 0286920A 000021 was issued by the respondent company on 10 August 1992 for the period 11 July 1992 to 10 July 1993. Therefore, at the time of the death of the insured, the PA H policy was in force. It is not disputed that the insured died as a result of a motor accident involving his car No WCN 9012 covered by the insurance policies issued by the respondent company.

It is not disputed that David Lim Risk Management Sdn Bhd was the authorized agent of the respondent company. This is confirmed by its I claims manager, Parry a/l NR Ramanunjam ('DW1'). Further, DW1 did not dispute that David Lim Risk Management Sdn Bhd issued the cover note as its agent that resulted in the PA policy being issued subsequently by

the respondent company (see pp 40 to 41 of the appeal record). An examination of the cover note (p 125 of the appeal record) clearly showed that it was issued in conjunction with motor cover note 1325078 for vehicle No WCN 9012 (see p 125 of the appeal record). DW1 went on further, under cross-examination, to say at p 42 of the appeal record:

> Upon being satisfied that the proposal form was in order a policy was issued.

Since the matter of agency was before him, the learned judge should have considered s 149 of the Contracts Act 1950.

Section 149 reads:

> Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

In this case, the person who signed the proposal form was not acting for itself but on behalf of the deceased. *Pollock & Mulla on Indian Contract and Specific Relief Acts* (11th Ed) Vol II at pp 1119 and 1120 said:

> It is essential to an agency by ratification that the act to be ratified is one wherein the agent was not acting for himself but, on behalf of the named or ascertained principal.

Even though the proposal form for the PA policy was not signed by the deceased, it was ratified by him when the premium for the policy was paid and for which a receipt was sent to the deceased (by the respondent company) acknowledging the payment.

The particulars in the proposal form were filled up by the clerk of the agent. In that case, the knowledge of the agent is to be imputed to the respondent company. In this respect, Bailhache J in *Keeling v Pearl Assurance Co Ltd* [1923] All ER 307 at p 309 said:

> No doubt, if the answers had been given by the assured, or by her husband, the policy would be void, but the agent in this case has inserted answers which are not consistent with, and in one case are certainly directly contrary to, the information which he had from the husband. If the knowledge of the agent is to be imputed to the insurance company, or if in filling up the proposal form he was acting as the agent for the insurance company, then, in as much as the answers are his own answers and not the answers of the assured, the policy is undoubtedly good.

In this case, there is no allegation by the respondent company that there was collusion or connivance between the agent and the proposer (deceased) or for that matter, anybody else in the formation of the contract of insurance. Neither is there any allegation of fraud. By the deceased ratifying the proposal by payment of the premium and the acceptance of the proposal submitted by its agent by issuing a receipt for the premium received and the issuance of the PA policy, a valid contract was concluded (see *Borhanuddin bin Haji Jantara & Anor v American International Assurance Co Ltd* [1987] 1 MLJ 22). It would be too late in the day for the respondent company to avoid liability by alleging that the signature on D2 was not that of the deceased.

The issue of agency is also covered by the Insurance Act 1996 ('the Act'). A

On knowledge of and statement made by insurance agent, s 151 of the Act reads:

> (1) A person who is authorized by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be knowledge of the licensed insurer. B
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> (2) A statement made, or act done, by the insurance agent shall be deemed, for the purpose of the formation of the contract of insurance, to be a statement made, or act done, by the licensed insurer notwithstanding the insurance agent's contravention of subsection 150(4) or any other provision of this Act. C
>
> (3) Subsection (1) shall not apply —
>
> (a) where there is collusion or connivance between the insurance agent and the proposer in the formation of the contract of insurance; or D
>
> (b) ... .

It seems clear therefore that unless there is evidence of collusion or connivance on the part of its agent, the respondent company cannot repudiate liability. As stated earlier, there is no allegation of collusion or connivance on the part of its agent by the respondent company. Hence, the respondent company cannot repudiate its liability on the PA policy. Though this issue was submitted to the learned judge, unfortunately he did not consider it at all. E

Counsel for the appellant also submitted that the learned judge should have invoked s 114(g) of the Evidence Act 1950 against the respondent company for not calling David Lim or his clerk that the signature on D2 was not that of the deceased when it was the evidence of PW2 and PW3 that the deceased signed on both D1 and D2 on the same day. The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk who should be in the best position to give evidence on the signature in D2. The irresistible inference would be that if David Lim or his clerk is called, their evidence would be unfavourable to the respondent company. We are of the opinion that counsel for the appellant was justified on this point but unfortunately, the learned judge thought otherwise and declined to consider and invoke s 114(g) of the Evidence Act 1950. Instead, he went on a microscopic examination of the evidence of PW2 and PW3 where obviously, due to lapse of time, one cannot expect PW2 and PW3 to remember the minute details as stated by the learned judge in concluding that the evidence of PW2 and PW3 could not be accepted on the signature issue. F G H I

The learned judge himself observed that the signature on D2 (fig 6 question Q at p 166 of the appeal record) under 'Discussion', in the opinion

of Siow Kwen Sin, forensic document analyst ('DW2') (p 161 of the appeal record), compared with that of the other specimen signature (especially the one in D1), were not written by the same hand. In fact, an examination of the signatures on D1 and D2 would show a marked difference to the naked eye. In our view, this marked difference would be obvious to the officer of the respondent company when perusing the two proposal forms submitted by its agent before accepting the proposals. However, it seemed that the respondent company chose to ignore it and issued the PA policy. In this respect, Bailhache J in *Keeling v Pearl Assurance Co Ltd*, touching on the mistake about the age of the assured, said at p 308:

> Obviously, it must have hit them in the eye the moment they had the proposal form. Yet, notwithstanding that, they chose to issue a policy; and if they chose to issue a policy on a proposal form which contained a mistake, obviously, on the face of it, without further inquiry, there is no ground, in my opinion, for vitiating the policy.

It was clear to us that the learned judge did not consider the issue of ratification when obviously the agency issue was squarely before him and further, he had erred in declining to invoke s 114(g) of the Evidence Act 1950 for the reasons stated by us.

In the circumstances, the appeal was allowed with costs here and below. Judgment to the appellant as prayed. Deposit to be refunded.

Appeal allowed.

Reported by Mohd Rizal Abidin